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Michael A. Umayam

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## **SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE: CAN “MOMENT OF SILENCE” STATUTES SURVIVE?**

Michael A. Umayam<sup>+</sup>

The First Amendment to the United States Constitution states, in part, that “Congress shall make no law respecting an establishment of religion.”<sup>1</sup> The Supreme Court has imposed this principle upon all of the states through the Fourteenth Amendment.<sup>2</sup> In *Santa Fe Independent School District v. Doe*,<sup>3</sup> the Supreme Court addressed the issue of whether a state school district violated the First Amendment’s Establishment Clause.<sup>4</sup> More specifically, the Court analyzed a policy created by the Santa Fe Independent School District (District) that allowed student-led, student-initiated prayer before varsity home football games over the school’s public address system.<sup>5</sup> The Court struck down the District’s policy as “invalid on its face,”<sup>6</sup> but limited its holding to policies that permitted “student-led, student-initiated prayer at football games.”<sup>7</sup>

Some questions regarding the constitutional limits of prayer in public schools however, remain unanswered.<sup>8</sup> Although the Supreme Court attempted to limit the scope of the *Santa Fe* holding to student-initiated prayer at football games, the decision may lead to

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<sup>+</sup> J.D. Candidate, May 2001, The Catholic University of America, Columbus School of Law.

1. U.S. CONST. amend. I.

2. *Wallace v. Jaffree*, 472 U.S. 38 (1985) (noting that the due process clause of the Fourteenth Amendment imposed “substantive limitations on the States’ power to legislate the First Amendment”). The Fourteenth Amendment, in relevant part, states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

3. 530 U.S. 290 (2000).

4. *Id.* at 294.

5. *Id.* at 294-95.

6. *Id.* at 317.

7. *Id.* at 301.

8. See Edward Walsh & Bill Miller, *School Prayer Is Dealt a Blow; High Court Strikes Down Tex. Policy Allowing Student-Led Invocations*, WASH. POST, June 20, 2000, at A1 (reporting that the “ruling is likely to lead to new challenges to [public] school district policies that allow ‘moments of silence’ and student-led prayers at official functions).

the conclusion that many other governmental policies violate the Establishment Clause.<sup>9</sup> Consequently, many "moment of silence" state laws are ripe for constitutional challenge.<sup>10</sup>

The Santa Fe Independent School District, a political subdivision in Texas located in the southern part of the state, is responsible for educating more than 4,000 students.<sup>11</sup> Prior to 1995, Santa Fe High School, the District's only high school, allowed prayer before each varsity football game.<sup>12</sup> The student council chaplain delivered the prayer over the school's public address system.<sup>13</sup> Two sets of current and former students challenged this practice in the district court by claiming it violated the First Amendment's Establishment Clause.<sup>14</sup>

The district court modified the policy to permit only nonsectarian, nonproselytizing prayer at football games, but refused to grant injunctive relief to stop prayer altogether.<sup>15</sup> Although the district court declared that the words "nonsectarian" and "nonproselytizing" were required to survive constitutional scrutiny under the First Amendment, the court permitted prayers at football games that referenced the "'Almighty,' or to 'God,' or to 'Our Heavenly Father (or Mother)' or the like."<sup>16</sup>

On appeal, a split panel of the Fifth Circuit affirmed the district court's ruling that the words "nonsectarian" and "nonproselytizing" constituted necessary elements of a viable and constitutional prayer policy.<sup>17</sup> However, the court failed to recognize football games as the type of somber annual event appropriately solemnized with a prayer.<sup>18</sup> Accordingly, the court reversed the district court's holding, in part, and held that the Establishment Clause did not permit prayer at school football games.<sup>19</sup>

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9. *See id.*

10. Bill Miller, *Ruling May Leave 'Moment of Silence' Laws Vulnerable*, WASH. POST, June 20, 2000, at A10 (speculating that the Court's ruling could fuel new challenges to laws permitting "moments of silence" in public schools).

11. *Santa Fe*, 530 U.S. at 294.

12. *Id.*

13. *Id.* The student body elected the student council chaplain. *Id.*

14. *Id.* The plaintiffs complained that the District allowed students to deliver "overtly" Christian prayers over the public address system at home football games. *Id.* at 295. The plaintiffs also challenged the constitutionality of a school policy that allowed students to read Christian invocations and benedictions at graduation ceremonies. *Id.*

15. *See Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 811 (5th Cir. 1999), *aff'd*, 530 U.S. 290, 317 (2000) (permitting "nondenominational prayers").

16. *Id.* at 811. This decision also applied to the school's policy, which allowed student-led prayer at graduation ceremonies. *Id.*

17. *Id.* at 824.

18. *Id.* at 823.

19. *Id.* at 823-24. In his dissent, Judge Jolly argued that the majority committed two primary errors that allowed it "to free fall into the black pit of the constitutionally forbidden." *Id.* at 824 (Jolly, J., dissenting). First, Judge Jolly suggested the majority

The District, disappointed with the Fifth Circuit's decision, petitioned for certiorari to the United States Supreme Court.<sup>20</sup> The Supreme Court faced the issue of whether "[the District's] policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."<sup>21</sup> The Court affirmed the Fifth Circuit and specifically found that an objective student would believe the school approved the prayer, and that the school likewise encouraged student participation in the prayer.<sup>22</sup> Moreover, the Court found that school approval of religious messages improperly "sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community.'"<sup>23</sup> Further, the Court rejected the District's argument that the policy had secular purposes and determined that the District implemented the policy for the sole purpose of endorsing prayer.<sup>24</sup> Therefore, the Court found that the District's policy violated the Establishment Clause.<sup>25</sup>

In contrast, the dissent argued that the majority misconstrued the policy to allow a student election on "prayer" and "religion" at football games.<sup>26</sup> The dissent claimed that the District's policy had plausible secular purposes, such as solemnizing the event, promoting good sportsmanship and good safety, and establishing the appropriate environment for competition, and that Establishment Clause jurisprudence did not require the "content neutrality" that the majority demanded.<sup>27</sup>

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misread prior precedent when it concluded that a "nonsectarian, nonproselytizing" requirement constitute[d] a necessary element" in upholding the prayer policy. *Id.* at 825 (Jolly, J., dissenting). Second, Judge Jolly stated that the majority erred when it failed "to recognize that the government may not restrict religious speech based on viewpoint when the government has created a forum for the expression of privately held views." *Id.* at 825 & n.4 (Jolly, J., dissenting).

20. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000); see also Ralph D. Mawdsley & Charles J. Russo, 143 EDUC. L. REP. 415, 416 (2000) (reducing the scope of their article into two parts: (1) reviewing the Fifth Circuit decision in *Santa Fe*, and (2) predicting how the Supreme Court would rule).

21. *Santa Fe*, 530 U.S. at 301.

22. *Id.* at 308.

23. *Id.* at 309-10. (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

24. *Id.* at 315 (refusing to "turn a blind eye to the context in which the policy arose"). The Court acknowledged that the government is entitled to deference regarding secular purposes for religious policies, but stated that courts must "distinguish[h] a sham secular purpose from a sincere one." *Id.* at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring)).

25. *Id.* at 317 (elaborating that the policy fails because it "establishes an improper majoritarian election on religion" and implies that the school encourages prayer at school events).

26. *Id.* at 320 (Rehnquist, C.J., dissenting) (finding specifically that the policy allowed students to vote on whether to have a speaker and, if the students voted to have a speaker, who that speaker would be).

27. *Id.* at 324, 325 (Rehnquist, C.J., dissenting).

This Note explores the development of the First Amendment law that limits school prayer, with a particular emphasis on United States Supreme Court decisions regarding prayer in public schools. Next, this Note examines the District's policy that permitted prayer before public high school football games. This Note then analyzes the Supreme Court's *Santa Fe* decision in light of previous Supreme Court jurisprudence regarding violations of the Establishment Clause. This Note concludes that the Court's decision to strike down the District's policy on the grounds that it violated the Establishment Clause was unwarranted because the policy was neither an unconstitutional endorsement of religion nor unconstitutionally coercive. This Note also concludes that the implications of the *Santa Fe* decision will lead to new and successful challenges to state laws that allow for a "moment of silence" in public schools.

## I. THE DEVELOPMENT OF THE LAW LIMITING SCHOOL PRAYER

### A. *An Overview Of The Establishment Clause*

The Establishment Clause of the First Amendment to the United States Constitution prohibits Congress from enacting laws respecting an establishment of religion.<sup>28</sup> Although there is universal agreement

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28. U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

The Establishment Clause, drafted in 1789, "intended to prohibit government sponsorship of religious activities." Nancy E. Drane, Comment, *The Supreme Court's Missed Opportunity: The Constitutionality of Student-Led Graduation Prayer in Light of the Crumbling Wall Between Church and State*, 31 LOY. U. CHI. L.J. 497, 503 & n.57 (2000); see also *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting a letter from Thomas Jefferson to the Danbury Baptists Association that fashioned the phrase "separation between church and state"). Professor R.K. Ramazani of the University of Virginia, a noted author and historian, argues that the Founding Fathers intended for the Establishment and Free Exercise Clauses to ensure that a state could not dictate an individual's beliefs. Editorial, TAMPA TRIB. TIMES, Oct. 31, 1999, at 2 (arguing that tolerance is necessary when state and religious interests overlap); see also Herbert S. Fain, Jr., *Prayer in Public Schools: A Moment of Silence*, 15 T. MARSHALL L. REV. 27, 34 (1989) (finding the Founding Fathers desired to safeguard individuals from encumbrances of a state mandated religion). One commentator believes the Founding Fathers also wanted to protect the government from religious influence and protect religion from government influence, but that the Founding Fathers did not mean to require the government to be actively hostile toward religious expression in order to ensure religious neutrality. Editorial, TAMPA TRIB. TIMES, Oct. 31, 1999, at 2.

The Supreme Court first dealt with the Establishment Clause in *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1 (1947). In *Everson*, the Court noted that the Establishment Clause originated from the early settlers' attempt to "escape the bondage of laws which compelled them to support and attend government-favored churches." *Id.* at 8. These early settlers witnessed as the jailing, torturing, and killing of those who spoke disrespectfully to ministers, failed to attend church services, expressed unbelief, and neglected to pay taxes and tithes to support

that the Establishment Clause prohibits the creation of an official church,<sup>29</sup> much of the agreement stops at this basic principle.<sup>30</sup> The Supreme Court has relied on three different approaches to determine the constitutionality of government actions regarding the establishment of religion in public schools.<sup>31</sup>

The Supreme Court enunciated one Establishment Clause test in *Lemon v. Kurtzman*.<sup>32</sup> The *Lemon* Court established that a government practice violates the Establishment Clause if the practice: (1) lacks a secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) excessively entangles government with religion.<sup>33</sup> Several Justices, however, have sharply criticized the *Lemon* Test and have called for its repudiation.<sup>34</sup>

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churches. See *id.* at 9. As such, the early settlers "reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." *Id.* at 11; see also Fain, *supra*, at 33 (asserting that the Founders drafted and adopted the First Amendment for the purpose of maintaining religious freedom and preventing punishment of nonbelievers).

In light of this history, the *Everson* Court found that the government could not establish a church, force or influence an individual to profess a particular belief, punish an individual for professing or entertaining particular religious beliefs, or levy a tax to support any religious activity or institution. *Everson*, 330 U.S. at 15-16. Open or secret participation in any religious group or organization by the government would also violate the Establishment Clause. See *id.* at 16. The Court did uphold a New Jersey program that allowed taxpayer funds to pay for the bus fares of parochial school students. See *id.* at 17. This particular program was part of a more general program that paid for the bus fares of students attending public and private schools. See *id.*

29. *Everson*, 330 U.S. at 15 ("Neither a state nor the Federal Government can set up a church."); GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1500 (13th ed. 1997) (asserting that all interpretations of the Establishment Clause agree that it prohibits the creation of an official church).

30. See GUNTHER & SULLIVAN, *supra* note 29, at 1500; see also *Lamb's Chapel v. Center of Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (noting the "Establishment Clause geometry of crooked lines and wavering shapes"); Harlan A. Loeb, *Suffering in Silence: Camouflaging the Redefinition of the Establishment Clause*, 77 OR. L. REV. 1305, 1335 (1998) (asserting that the Supreme Court's inconsistency in Establishment Clause jurisprudence has given state courts "excessive leeway" in interpreting cases); Ronald D. Wenkart, *Prayer in School: Can a Solution Be Found?*, 138 EDUC. L. REP. 597, 598 (1999) (stating that the words of the Establishment Clause have been difficult for courts to define).

31. See Daniel Washburn, Comment, *Student-Initiated Religious Speech in Public Schools [Chandler v. James]*, 180 F.3d 1254 (11th Cir. 1999), 39 WASHBURN L.J. 273, 276 (2000) (mentioning the three approaches that the Supreme Court uses in Establishment Clause jurisprudence). Washburn concluded that the Eleventh Circuit correctly analyzed student-initiated religious speech as private speech, and, thus, constituted constitutional speech under the First Amendment. *Id.* at 287.

32. 403 U.S. 602, 625 (1971) (holding that state statutes providing state aid to church-related elementary and secondary schools violate the Constitution).

33. *Id.* at 612-13.

34. See GUNTHER & SULLIVAN, *supra* note 29, at 1501 (noting that the *Lemon* Test

The Court announced a second test in *Lee v. Weisman*,<sup>35</sup> which is commonly referred to as the Coercion Test.<sup>36</sup> Under this test, the Court analyzes "school-sponsored religious . . . activity to determine the extent . . . [of its] coercive effect on students."<sup>37</sup> Unconstitutional coercion occurs when the government directs a formal religious exercise that forces the participation of objectors.<sup>38</sup>

A third test, known as the Endorsement Test, attempts to determine whether the government endorses religion through governmental action.<sup>39</sup> The Endorsement Test determines that a government action is unconstitutional if it "endorses," "favors," "prefers," or "promotes" a certain religious belief over another.<sup>40</sup>

Though Establishment Clause jurisprudence is less than clear, courts analyze government practices challenged on Establishment Clause grounds under these three complementary, and occasionally overlapping, tests established by the Supreme Court.<sup>41</sup> The Court currently eschews the application of a single test and evaluates Establishment Clause claims with a combination of all three.<sup>42</sup>

## B. A Review of Supreme Court Decisions Limiting Prayer in Public Schools

### 1. Engel v. Vitale: The First Step in Limiting Prayer in Public Schools

The Supreme Court first limited school prayer in public schools

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has survived formal renunciation despite criticism). The principle criticisms of the *Lemon* Test are:

(1) that the "purpose" requirement, taken literally, would invalidate all deliberate government accommodation of religion, even though such accommodation is sometimes required by the [F]ree [E]xercise [C]lause, and has sometimes been held permissible under the [E]stablishment [C]lause even if not constitutionally compelled; (2) that legislative "purpose" is in any case difficult to ascertain in a multi-member body, and (3) that the "entanglement" prong contradicts the previous two . . . [However, *some* administrative "entanglement" is essential to ensure that government aid does not excessively promote religious purposes.

*Id.*

35. 505 U.S. 577 (1992).

36. See, e.g., *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 814 (5th Cir. 1999), *reh'g en banc denied*, 171 F.3d 1013 (5th Cir. 1999) (per curiam), *aff'd*, 530 U.S. 290, 317 (2000) (citing *Lee v. Weisman*, 505 U.S. 577 (1992)).

37. *Santa Fe*, 168 F.3d at 814.

38. See, e.g., *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 969-70 (5th Cir. 1992) (referring to *Weisman*, 505 U.S. at 577) (*Clear Creek II*).

39. See *Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989).

40. *Id.*

41. See *Santa Fe*, 168 F.3d at 814.

42. See Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 160-62, 164-65 (2000) (examining the changing Establishment Clause doctrine regarding devotional activities in public schools).

in its landmark decision of *Engel v. Vitale*.<sup>43</sup> The New York State Board of Regents, a government agency with broad supervisory, executive, and legislative powers, recommended that each school district recite a daily prayer at the beginning of every school day.<sup>44</sup> This recommendation prompted the Board of Education of Union Free School District No. 9 to direct that such a prayer be recited.<sup>45</sup> Shortly after the School District adopted this policy, the parents of ten students filed suit in state court claiming that this recitation violated the First Amendment.<sup>46</sup> In response, the State argued that the prayer program did not establish religious beliefs because it was nondenominational, the school district did not require all students to recite it, and the policy allowed all students who wished not to participate to remain silent or be excused from the room.<sup>47</sup>

Without citing a single case and over Justice Stewart's lone dissent, the Supreme Court held that the recitation of the daily prayer was entirely inconsistent with the Establishment Clause.<sup>48</sup> The Court described the daily classroom invocation as a "religious activity" and stated that the Establishment Clause prohibits the composition of official prayers that are recited as part of a religious program created by the government.<sup>49</sup>

The Court rejected the State's arguments because, in its opinion, the drafters of the Constitution included the First Amendment to guarantee that the federal government would not control, support, or pressure an individual's choice of religion.<sup>50</sup> Because Establishment

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43. 370 U.S. 421 (1962); see Drane, *supra* note 28, at 511 (pointing out that the Court first considered school prayer in *Engel*); Gunther & Sullivan, *supra* note 29, at 1504 (describing *Engel* as the Court's first encounter with school prayer initiated by school officials).

44. *Engel*, 370 U.S. at 422-23. State officials composed the prayer and published it as a part of their 'Statement on Moral and Spiritual Training in the Schools,' which stated that: "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program." *Id.* at 423.

45. See *id.* at 422. The prayer read as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.*

46. See *id.* at 423 (insisting that prayer in public schools contravened "the beliefs, religions, or religious practices of both themselves and their children").

47. See *id.* at 430.

48. *Id.* at 424. Justice Stewart thought the majority "misapplied a great constitutional principle" as he could not see how "an 'official religion' [was] established by letting those who want to say a prayer say it." *Id.* at 444, 445 (Stewart, J., dissenting). Justice Stewart would have focused on the "history of the religious traditions of [the American] people, reflected in countless practices of the institutions and officials of [their] government," and upheld the school district's policy. *Id.* at 446, 450 (Stewart, J., dissenting).

49. *Id.* at 424-25.

50. *Id.* at 429-30; see also Drane, *supra* note 28, at 511 (observing that the Court expressed a "traditional separatist view between church and state" in finding the policy unconstitutional); Margaret Richardson, Comment, *The Constitutionality of*



Clause violations occur through laws that establish religion, regardless of whether those laws operate to coerce nonobserving individuals directly, the Court held that "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause."<sup>51</sup> Accordingly, the New York school district's daily prayer policy did not survive constitutional scrutiny.<sup>52</sup>

## 2. *Abington School District v. Schempp: Broadening the Limits of School Prayer in Public Schools*

One year after *Engel*, the Supreme Court extended the Establishment Clause principles articulated in *Engel* beyond state-composed prayers.<sup>53</sup> In *Abington School District v. Schempp*,<sup>54</sup> the Supreme Court considered whether state laws mandating the reading of verses from the Holy Bible at the start of each day in public schools violated the Establishment Clause.<sup>55</sup>

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*North Carolina's Moment of Silence Statute*, 22 N.C. CENT. L.J. 200, 210 (1996) (remarking that the Court strongly relied on the "theory of a 'wall' of separation" between church and state).

51. *Engel*, 370 U.S. at 430; see Drane, *supra* note 28, at 511-12 (emphasizing that the Court regarded the mere presence of a prayer written and endorsed by the state as an unconstitutional sponsorship of religion). Referencing the history of governmentally established religion in both England and the United States, the Court reiterated the concern that the government would favor one religion and develop a "hatred, disrespect and even contempt of those who held contrary beliefs." *Engel*, 370 U.S. at 431. The Court expressed concern about possible religious persecutions. *Id.* at 432; see also Patrick F. Brown, Note, *Wallace v. Jaffree and the Need To Reform Establishment Clause Analysis*, 35 CATH. U. L. REV. 573, 578 (1986) (observing that the Court pointed to the government practice of composing prayers and compelling their recitation as a primary reason for colonists fleeing England and seeking religious freedom in America).

52. See *Engel*, 370 U.S. at 436.

53. See Gunther & Sullivan, *supra* note 29, at 1504-07 (summarizing the Supreme Court's Establishment Clause jurisprudence).

54. 374 U.S. 203 (1963).

55. *Id.* at 205, 211; see also Mary Ellen Quinn Johnson, Comment, *School Prayer and the Constitution: Silence Is Golden*, 48 MD. L. REV. 1018, 1030 (1989). The *Schempp* case challenged two state laws. *Schempp*, 374 U.S. at 205-12. The Pennsylvania law at issue required that "[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." PA. STAT. ANN. tit. 24 § 15-1516 (West 1959); see also *Schempp*, 374 U.S. at 205. The *Schempp* family sued to enjoin enforcement of the statute and contended that the statute infringed upon the family's rights under the First and Fourteenth Amendments. *Schempp*, 374 U.S. at 205.

The second law at issue was a rule adopted by the Board of School Commissioners of Baltimore, Maryland. *Schempp*, 374 U.S. at 211; see also MD. CODE ANN. EDUC. § 7-104 (1978). The rule "provided for the holding of opening exercises in the schools of the city, consisting primarily of the 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.'" § 7-104. Two professed atheists

The Supreme Court noted that to withstand constitutional scrutiny under the Establishment Clause, a government action must have a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>56</sup> Government action fails to withstand constitutional scrutiny if the action violates either part of this test.<sup>57</sup>

The Court applied these Establishment Clause principles to *Schempp* and found that the state must take a neutral position on religion.<sup>58</sup> In this case, however, the Court characterized the policies as not neutral.<sup>59</sup> Accordingly, the Supreme Court concluded that state laws and practices fall short of the requirements of the Establishment Clause when they "requir[e] the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison."<sup>60</sup> The religious nature of these exercises violated the concept of neutrality discussed above; accordingly they could not withstand constitutional scrutiny.<sup>61</sup>

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alleged that the rule violated their First and Fourteenth Amendment rights. *Schempp*, 374 U.S. at 212. They also claimed that the rule violated the principle of separation between church and state. *Id.*

56. *Schempp*, 374 U.S. at 222 (citing *Everson v. Board of Education the Township of Ewing*, 330 U.S. 1 (1947)); see also Johnson, *supra* note 55, at 1030 (discussing the two-part test for determining the constitutionality of government activity under the Establishment Clause).

57. See *Schempp*, 374 U.S. at 222 (stating that if either the legislative purpose or primary effect of the enactment "advance[s] or inhibit[s] . . . religion[,] then the enactment exceeds the scope of legislative power as circumscribed by the Constitution").

58. *Id.* at 226. That individual students, upon parental request, may be excused from the prayer fails to render the policy constitutional. See *id.* at 224-25. Further, the Court discounted the State's argument that the religious practices constituted "relatively minor encroachments on the First Amendment" out of concern that the "breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *Id.* at 225.

59. *Id.* at 223 (agreeing with the trial court's assessment). The Court elaborated upon this concept of neutrality when it adopted the Endorsement Test in *Allegheny v. ACLU*, 492 U.S. 573, 621 (1989), which concluded that a nativity scene display within a county courthouse is unconstitutional, but that the display of a Jewish menorah next to a Christmas tree outside of a county building is constitutional. In *Allegheny*, the Court held that the government violates the Establishment Clause when it appears to "endorse," "favor," "prefer," or "promote" a certain religious belief over others. *Id.* at 593-94.

60. *Schempp*, 374 U.S. at 223; see also Wenkart, *supra* note 30, at 602 (interpreting *Schempp* to mean that by requiring Bible readings and recitation of the Lord's Prayer, the State incorporated such practices into curriculum, thus violating the Establishment Clause). The Court however, clarified that the First Amendment permits the objective study of the Bible or religion when presented as component of a secular education program. *Schempp*, 374 U.S. at 225.

61. See *id.* at 223; see also Richardson, *supra* note 50, at 210 (commenting that, like *Engel*, the *Schempp* Court strongly "rel[ie]d on [the] theory of a 'wall' of separation").

### 3. *Wallace v. Jaffree: Tackling the Problem of "Moments of Silence"*

In *Wallace v. Jaffree*,<sup>62</sup> the Supreme Court decided whether an Alabama statute, which authorized a teacher-led period of silence for meditation or voluntary prayer, established religion within the meaning of the First Amendment.<sup>63</sup> A resident of Mobile County, Alabama, challenged this statute on behalf of his three minor children.<sup>64</sup> The complaint sought to enjoin the State from maintaining regular religious prayer services or observances in public schools, such as the teacher-led period of silence, in violation of the Establishment Clause of the First Amendment.<sup>65</sup>

The Court began its analysis by concluding that the First Amendment, with all of its limitations, applies to the states through the Due Process Clause of the Fourteenth Amendment.<sup>66</sup> "[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."<sup>67</sup> Next, the Court analyzed the Alabama statute to determine if: (1) it had a secular legislative purpose; (2) its principal or primary effect advanced or inhibited religion; or (3) it fostered an excessive government entanglement with religion, pursuant to the *Lemon* Test.<sup>68</sup> The Court applied the *Lemon* Test and determined that section 16-1-20.1 of the Alabama Code clearly did not embody any

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62. 472 U.S. 38 (1985).

63. *Id.* at 41-42. The relevant section of the Alabama Code provides that:

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

ALA. CODE § 16-1-20.1 (1995). It is important to note that no "moment of silence" statute existed before the Supreme Court's decisions in *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963). Arval A. Morris, *School Prayer and Meditation in the Public Schools: Wallace v. Jaffree*, 26 EDUC. L. REP. 13, 27 (1985) (asserting that statutes passed shortly after the *Engel* and *Schempp* decisions indicate legislative intent to avoid adhering to the decisions); see also Perry A. Zirkel & Christina L. Ager, *Moment-of-Silence Laws After Wallace v. Jaffree: Are They Constitutional?*, 29 EDUC. L. REP. 927, 935 (1986) (observing that "moment of silence" laws arose after Supreme Court school prayer decisions).

64. *Wallace*, 472 U.S. at 42 (describing the minor plaintiffs as two second grade students and one kindergarten student).

65. *Id.* The plaintiff asked the trial court to prevent the State from "maintaining or allowing the maintenance of regular religious prayer services or other forms of religious observances in the Mobile County Public Schools in violation of the First Amendment as made applicable to states by the Fourteenth Amendment." *Id.*

66. *Id.* at 49. The addition of the Fourteenth Amendment allowed the Constitution to prohibit states from depriving liberty without due process and "imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on Congress' power." *Id.*

67. *Id.* at 53.

68. *Id.* at 55-56 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

secular purpose.<sup>69</sup> Instead, the Court found that the Alabama legislature enacted the statute for the sole purpose of endorsing prayer in its schools.<sup>70</sup> This endorsement by the state contradicted the established principle of complete neutrality regarding religion that the Court required.<sup>71</sup> As the First Amendment requires the invalidation of a statute that is motivated entirely by the purpose of advancing religion,<sup>72</sup> the Court concluded section 16-1-20.1 violated the Establishment Clause.<sup>73</sup>

#### 4. *Lee v. Weisman: Expanding the Limits Beyond the Classroom*

In *Lee v. Weisman*,<sup>74</sup> the Court addressed school prayer outside the classroom when it confronted the issue of whether the inclusion of prayers by clergy members during a school graduation ceremony violated the Establishment Clause.<sup>75</sup> Prior to this decision, the School Committee and Superintendent of Schools for Providence, Rhode Island, customarily allowed members of the clergy to offer invocations and benedictions at official graduation ceremonies.<sup>76</sup> Providence school officials also routinely provided the invited clergy with a pamphlet prepared by the National Conference of Christians and Jews.<sup>77</sup> This pamphlet contained guidelines for delivering invocations at school graduations.<sup>78</sup>

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69. *Id.* at 56.

70. *Id.* at 60; Loeb, *supra* note 30, at 1328. The Court, in formulating its decision, relied on the legislative record and the testimony of State Senator Donald Holmes, the sponsor of the bill that became section 16-1-20.1, who stated that his only purpose in supporting this bill included returning voluntary prayer to public schools. *Wallace*, 472 U.S. at 57. Senator Holmes described the bill as "an 'effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction.'" Fain, *supra* note 28, at 51 & n.150. The State presented no evidence of a secular purpose at trial. See *Wallace*, 462 U.S. at 57.

71. *Wallace*, 462 U.S. at 60.

72. *Id.* at 56. *Contra* Brown, *supra* note 51, at 588 (criticizing the *Lemon* Test because it "diffuses the meaning of the Constitution and displaces the intent of the original drafters of the [E]stablishment [C]lause with that of the members of the Supreme Court").

73. *Wallace*, 462 U.S. at 61. Because the statute failed the secular purpose prong of the *Lemon* Test, the Court found it unnecessary to address the primary effect and excessive entanglement prongs. *Id.*; see also Martha M. McCarthy, *Wallace v. Jaffree: A Reprieve in the Erosion of the Establishment Clause?*, 25 EDUC. L. REP. 19, 22 (1985) (discussing *Wallace* and its relationship with other Establishment Clause cases). *Contra* Chandler v. Siegelman, 230 F.3d 1313, 1317 (11th Cir. 2000) (reversing a permanent injunction that abrogated an Alabama statute that allowed nonsectarian, nonproselytizing student-initiated prayer at school-related events).

74. 505 U.S. 577 (1992).

75. *Id.* at 580.

76. *Id.* at 581.

77. *Id.*

78. *Id.* The pamphlet recommended that public prayers at nonsecretarian civic ceremonies be inclusive and sensitive. *Id.* However, the pamphlet acknowledged that "[p]rayer of any kind may be inappropriate on some civic occasions." *Id.* Justice

Pursuant to this policy, Rabbi Leslie Gutterman delivered both an invocation and a benediction during the graduation ceremony for the Nathan Bishop Middle School.<sup>79</sup> As a result, Daniel Weisman, the parent of a student participating in the graduation ceremony, sought to bar Providence public school officials from inviting clergy to deliver invocations and benedictions at any future public school graduation.<sup>80</sup> The Court held that state officials "directed the performance of a formal religious exercise" during the graduation

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Kennedy concluded that the principals "directed and controlled the content of the prayer" by disseminating these pamphlets. See Kevin E. Broyles, *Recent Development, Establishment of Religion and High School Graduation Ceremonies: Lee v. Weisman*, 112 S. Ct. 2649 (1992), 16 HARV. J.L. PUB. POL'Y 279, 281 (1993) (arguing that the *Weisman* decision does little to alleviate existing confusion between the Free Exercise and Establishment Clauses).

79. *Weisman*, 505 U.S. at 581, 584.

The rabbi's invocation read as follows:

"INVOCATION

"God of the Free, Hope of the Brave:

"For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these new graduates grow up to guard it.

"For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

"For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

"May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN"

*Id.* at 581-82.

The rabbi's benediction read as follows:

"BENEDICTION

"O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

"Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

"The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

"We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN"

*Id.* at 582.

80. *Id.* at 584. The Court found it unnecessary to address the alleged standing issue because the daughter, Deborah Weisman, was enrolled in a Providence high school and, with all certainty, would have an invocation and benediction read at her high school graduation. *Id.*

ceremony.<sup>81</sup>

The Court interpreted the Constitution to guarantee that the government will not coerce a person into participating in religious exercises.<sup>82</sup> Further, the Court found that the school district's supervision of a public school graduation placed considerable public and peer pressure on the attending students to stand as a group or to maintain respectful silence during the invocation.<sup>83</sup> As such, for many of the students at the graduation the act of standing or remaining silent constituted participation in the rabbi's prayer.<sup>84</sup> The Court found that the State may not contravene the Establishment Clause and place school children in this position.<sup>85</sup>

Although the parties stipulated that the graduation and promotional ceremonies were voluntary, the Supreme Court acknowledged that "the Constitution forbids the State to exact religious conformity from a student as the price of attending her own . . . graduation."<sup>86</sup> The "State ha[d] in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid."<sup>87</sup> "[T]he conformity required of the student . . . was too high an exaction to withstand the test of the Establishment Clause."<sup>88</sup> Accordingly, the Court held that the Establishment Clause forbids clergy members from offering prayers as part of an official school graduation ceremony because students cannot be compelled to participate in religious exercises.<sup>89</sup>

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81. *Id.* at 586.

82. *Id.* at 587. Such coercion is particularly dangerous when it "establishes a [state] religion or religious faith or tends to do so." *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

83. *Id.* at 593; see also Broyles, *supra* note 78, at 282 (classifying this argument as a "new psychological test of coercion" within First Amendment Establishment Clause jurisprudence); Paula Savage Cohen, Comment, *Psycho-Coercion, A New Establishment Clause Test: Lee v. Weisman and Its Initial Effect*, 73 B.U. L. REV. 501, 512 (1993) (observing the Court's comparison of the psychological coercion found in graduation ceremonies with that of coercion found in classroom prayers).

84. *Weisman*, 505 U.S. at 593. The Court decided that this pressure could lead a reasonable student dissenter to believe that standing up or remaining silent signified approval of the religious exercise. *Id.* (recognizing that dissenters are not comforted by the argument that the act of standing or remaining silent signifies respect, rather than participation).

85. *Id.* (noting that adolescents are susceptible to peer pressure). *Contra* Cohen, *supra* note 83, at 518 (contending that the *Weisman* Court failed to consider the age and maturity of graduating seniors).

86. *Weisman*, 505 U.S. at 594, 596 (finding the parties stipulated in the district court "that attendance at graduation and promotional ceremonies is voluntary").

87. *Id.* at 598.

88. *Id.*

89. *Id.* at 599; see also Broyles, *supra* note 78, at 286 (saying that *Weisman* reaffirms "the dominant Supreme Court approach" to constitutional interpretation);

### C. A Review of Fifth Circuit Law Prior to Santa Fe

#### 1. *Jones v. Clear Creek Independent School District (Clear Creek I)*

On the same day that the Supreme Court decided *Lee v. Weisman*, it vacated and remanded *Jones v. Clear Creek Independent School District*,<sup>90</sup> wherein the Fifth Circuit upheld student-initiated graduation prayer.<sup>91</sup> The Clear Creek Independent School District traditionally allowed graduating students to include and present voluntarily written invocations and benedictions in the graduation ceremony.<sup>92</sup> Two students challenged this tradition by filing a lawsuit that alleged Clear Creek's policies and actions violated the Establishment Clause.<sup>93</sup>

Before the district court tried the case, Clear Creek's Board of Trustees adopted an express resolution that formally reduced this tradition to writing.<sup>94</sup> The district court found that the school's written policy, which permitted only nonsectarian and nonproselytizing prayer, did not violate the Establishment Clause.<sup>95</sup> Therefore, the district court granted summary judgment for Clear

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Marjorie A. Silver, *Rethinking Religion and Public School Education*, 15 QUINNIAC L. REV. 213, 214 (1995) (asserting that *Weisman* reaffirms the *Engel* and *Schempp* decisions). Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, wrote a dissenting opinion, which contended that "prayer has been a prominent part of government ceremonies and proclamations." *Id.* at 633 (Scalia, J., dissenting). They further argued that "[v]oluntary prayer at graduation—a one-time ceremony at which parents, friends, and relatives are present—can hardly . . . raise the same concerns" as school prayer. *Id.* at 644 (Scalia, J., dissenting). The dissent concluded that the majority's policy is as "senseless . . . as it is unsupported in law." *Id.* at 646 (Scalia, J., dissenting); see also Cohen, *supra* note 83, at 516 (arguing that the *Weisman* majority ignored prior Establishment Clause jurisprudence and, instead, adopted a vague and confusing psycho-coercion test); Brook Millard, Note, *Lee v. Weisman and the Majoritarian Implications of Establishment Clause Jurisprudence*, 71 DENV. U. L. REV. 759, 773-74 (1994) (criticizing the Coercion Test as fundamentally flawed because it is result-oriented and furthers majority control of the community).

90. 930 F.2d 416 (5th Cir. 1991), *cert. granted, vacated, and remanded*, 505 U.S. 1215 (1992) (*Clear Creek I*).

91. *Id.* at 424.

92. *Id.* at 417.

93. *Id.* (noting that the school district let students recite "traditional Christian" prayers).

94. *Id.* The Resolution provides:

1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
2. The invocation and benediction, if used, shall be given by a student volunteer; and
3. Consistent with the principal of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

*Id.*

95. *Id.* at 417-18.

Creek.<sup>96</sup> The plaintiffs appealed to the Fifth Circuit Court of Appeals.<sup>97</sup>

The Court of Appeals applied the three-pronged *Lemon* Test, affirmed the decision of the district court, and found that Clear Creek's tradition of student-initiated prayer did not violate the Establishment Clause.<sup>98</sup> The Fifth Circuit Court of Appeals specifically found that the resolution had a secular purpose,<sup>99</sup> did not have a primary effect of advancing religion,<sup>100</sup> and failed to entangle government and religion excessively.<sup>101</sup> The Supreme Court granted certiorari,<sup>102</sup> and held that the inclusion of prayers by clergy members at the school graduation ceremony violated the Establishment Clause.<sup>103</sup> The Court remanded the case to the Fifth Circuit for further consideration.<sup>104</sup>

## 2. *Jones v. Clear Creek Independent School District (Clear Creek II)*

On remand, the Fifth Circuit, in *Jones v. Clear Creek Independent School District (Clear Creek II)*,<sup>105</sup> maintained the position that the school district's prayer policy had the primary secular purpose of solemnizing graduation ceremonies and did not have the primary effect of advancing religion.<sup>106</sup> The Fifth Circuit also held that the

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96. *Id.* at 418.

97. *Id.* at 417.

98. *Id.* at 423.

99. *Id.* at 419-21 (describing the secular purpose as solemnizing graduation ceremonies).

100. *Id.* at 421-22 (noting Clear Creek's passive role in the recitation of invocations and concluding that the invocations enhanced the meaning of the graduation while minimizing government endorsement of religion).

101. *Id.* at 422-23 (explaining that excessive entanglement is impossible because the invocations are nonsectarian and the students write and present the invocations).

102. *Jones v. Clear Creek Ind. Sch. Dist.*, 505 U.S. 1215, 1215 (1992) (*Clear Creek I*).

103. *Id.*

104. *Id.* ("The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Lee v. Weisman*.").

105. 977 F.2d 963 (5th Cir. 1992), *reh'g denied*, 983 F.2d 234 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) (*Clear Creek II*).

106. *Id.* at 966-67 (finding that a graduation ceremony "can provide encouragement to finish school and the inspiration and self-assurance necessary to achieve after graduation, which are secular objectives"). Religion will only be advanced if it attempts to attract new believers or increase the faith of the faithful. *See id.* at 967. *Contra* Allan Gordus, Note, *The Establishment Clause and Prayers in Public High School Graduations: Jones v. Clear Creek Independent School District*, 47 ARK. L. REV. 653, 668, 672 (1994) (submitting that the Resolution was unconstitutional because it purposely introduced prayer and religion at graduation exercises and had the primary effect of advancing religion because prayer can only have a religious effect); Loeb, *supra* note 30, at 1323 (arguing that the Fifth Circuit's finding that the resolution did not advance prayer contradicted the *Weisman* decision).



tradition did not constitute excessive entanglement through its yearly review of "unsolicited material for sectarianism and proselytization" because the resolution did not involve Clear Creek with religious institutions.<sup>107</sup>

Further, the tradition did not constitute an unconstitutional government endorsement of religion because it merely permitted an invocation if the graduating seniors chose to have one.<sup>108</sup> Moreover, the tradition did not unconstitutionally coerce students because it did not force objectors to participate.<sup>109</sup> The Fifth Circuit noted that these graduation prayers placed less psychological pressure on the students than the prayers at issue in *Weisman* because all students participated in the decision of whether to pray, and the prayers are presented by a peer who, in the court's view, is less likely to coerce participation than a government official or member of the clergy.<sup>110</sup>

Accordingly, the Fifth Circuit held that the *Weisman* decision, although similar, did not render Clear Creek's invocation policy unconstitutional because Clear Creek's policy involved student-initiated prayer.<sup>111</sup> The Supreme Court's denial of a subsequent writ of certiorari let the Fifth Circuit's decision to permit student-initiated prayer at public school ceremonies stand.<sup>112</sup>

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107. *Clear Creek II*, 977 F.2d at 967-68. *Contra* Gordus, *supra* note 106, at 674-75 (asserting that Clear Creek is entangled in the affairs of religion); Loeb, *supra* note 30, at 1324 (pointing out that the Fifth Circuit later ruled that government involvement in determining whether prayer was nonsectarian and nonproselytizing constituted excessive entanglement).

108. *See Clear Creek II*, 977 F.2d at 968. *But see* Gordus, *supra* note 106, at 680 (asserting that the Clear Creek's restrictions on student speech constitutes government involvement and consequently, violates the Endorsement Test); Loeb, *supra* note 30, at 1325 (claiming that the Fifth Circuit ignored the strong involvement by the states in public school graduation ceremonies).

109. *See Clear Creek II*, 977 F.2d at 971-72 (saying that the "coercive effect of any prayer permitted by the Resolution is more analogous to the innocuous 'God save the United States and this Honorable Court' stated by and to adults than the government-mandated message" in *Weisman*). *But see* Gordus, *supra* note 106, at 688 (concluding that prayers given pursuant to the Resolution violated the Coercion Test).

110. *Clear Creek II*, 977 F.2d at 971 (mentioning that graduating seniors "'are less impressionable than younger students'").

111. *Id.* at 971-72.

112. *Jones v. Clear Creek Indep. Sch. Dist.*, 508 U.S. 967 (1993). *But see* Loeb, *supra* note 30, at 1325-32 (concluding that the Fifth Circuit's decision was misguided because the Court failed to focus on the coercive nature of the event and arguing that all prayer at graduation services is unconstitutionally coercive because students are coerced into attending graduations). In contrast to the Fifth Circuit's *Clear Creek II* decision, the Third and Ninth Circuit Courts of Appeals found that giving students control of prayers during graduation ceremonies was not enough to satisfy constitutional scrutiny. *See* McCarthy, *supra* note 42, at 141 & nn.121&122 (citing *ACLU v. Blackhorse Pike Regional Board of Education*, 84 F.3d 1471, 1477 (3d Cir. 1996), which declared that "an impermissible practice cannot be transformed into a constitutionally acceptable one by putting a democratic process to an improper use"; and *Harris v. Joint School District*, 41 F.3d 447, 452 (9th Cir. 1994), *vacated*, 515

II. SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE: THE NEXT STEP IN  
LIMITING PRAYER IN PUBLIC SCHOOLS

A. The Facts

For an unknown period of time prior to and including the 1992-1993 and 1993-1994 school years, the Santa Fe Independent School District allowed students to read Christian prayers at all graduation ceremonies and home varsity football games.<sup>113</sup> The student chaplain, who is elected by the school's student council, typically delivered the prayers before each of these events.<sup>114</sup>

In April 1995, two sets of current and former students and their mothers<sup>115</sup> sought a temporary restraining order to prevent student-led prayers during the graduation ceremony.<sup>116</sup> In addition to the prospective injunctive and declaratory relief, the families also sought money damages under 42 U.S.C. § 1983.<sup>117</sup>

On May 10, 1995, the district court entered an interim order permitting a senior student or students chosen by the senior class to give a "non-denominational prayer" during the graduation ceremony.<sup>118</sup> Students, without the oversight of school officials,

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U.S. 154 (1995), which reiterated that there is "no meaningful distinction between school authorities actually organizing the religious activity and officials merely [allowing] students to direct the exercises").

113. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 810 (5th Cir. 1999), *reh'g en banc denied*, 171 F.3d 1013 (5th Cir. 1999) (per curiam), *aff'd*, 530 U.S. 290, 317 (2000). The Santa Fe Independent School District is a political subdivision in Texas. *Id.* at 809.

114. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000).

115. *Id.* "The District Court permitted respondents (Doe's) to litigate anonymously in an effort to protect them from intimidation or harassment." *Id.* That these parties were allowed to litigate anonymously caused quite a controversy. *Id.* at 294-95 n.1.

116. *Id.* at 295. The complaint asserted several claims against the District. *Id.* First, the families claimed that the District used several proselytizing practices, including "promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises." *Id.* Second, the families alleged that the District allowed the reading of Christian invocations and benedictions at graduation ceremonies and permitted students to deliver prayers before football games over the public address system. *Id.*

117. *Santa Fe*, 168 F.3d at 811. Section 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994).

118. *Santa Fe*, 530 U.S. at 295-96.

would prepare the contents of the prayer.<sup>119</sup> The prayer could reference religious figures as Mohammed, Jesus, Buddha, or the like, if the “thrust of the prayer [was] non-proselytizing.”<sup>120</sup>

The District responded to the court’s order by adopting a series of policies that dealt with prayer at school functions.<sup>121</sup> One particular policy allowed the graduating seniors to vote on whether to have “nonsectarian, nonproselytizing” invocations and benedictions at their graduation ceremony.<sup>122</sup> In July 1995, however, the District eliminated the requirement that these invocations and benedictions be nonsectarian and nonproselytizing.<sup>123</sup>

In addition, the District enacted a policy in August 1995, which addressed prayer before high school varsity football games.<sup>124</sup> This “Prayer at Football Games” policy authorized two student elections.<sup>125</sup> The first election determined whether students would deliver invocations before football games.<sup>126</sup> The second election selected the student who would give the invocation.<sup>127</sup> The policy did not require the invocation to be nonsectarian and nonproselytizing; however, the policy contained a fallback provision, which automatically required “nonsectarian and nonproselytizing” prayer if the district court enjoined the District’s newly adopted policy.<sup>128</sup>

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119. *Id.* at 296 (noting that school officials would neither scrutinize nor preapprove the text of the prayers).

120. *Id.*

121. *Id.*

122. *Id.* at 296-97. The “emergency response” policy provided:

The Board *has chosen to permit* the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver *nonsectarian, nonproselytizing invocations and benedictions* for the purpose of solemnizing their graduation ceremonies.

*Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 811-12 (5th Cir. 1999), *reh’g en banc denied*, 171 F.3d 1013 (5th Cir. 1999) (per curiam), *aff’d*, 530 U.S. 290, 317 (2000) (citing *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992)).

123. *Santa Fe*, 530 U.S. at 297. The policy did state that if the District were to be enjoined from enforcing this new policy, the May 1995, policy would automatically take effect. *Id.*

124. *Id.* at 297-98. This prayer policy permitted a student-selected, student-given “brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.” *Santa Fe*, 168 F.3d at 812.

125. *Santa Fe*, 530 U.S. at 297.

126. *Id.*

127. *Id.*

128. *Id.* at 297-98 (noting, however, that the District’s preferred practice did not require “nonsectarian and nonproselytizing” prayer).

The District passed another policy in October 1995.<sup>129</sup> This “final policy” essentially mirrored the August 1995 policy regarding prayer at football games, except that it omitted the word “prayer” from the title and replaced it with the words “messages,” “statements,” and “invocations.”<sup>130</sup> The Supreme Court’s *Santa Fe* decision caused a constitutional earthquake, which centered on the validity of this final policy.<sup>131</sup>

### *B. The Santa Fe Majority Holding*

The *Santa Fe* Court invalidated the District’s policy of permitting student-led, student-initiated prayer at football games because it violated the Establishment Clause of the First Amendment.<sup>132</sup> The Court declared the policy “invalid on its face” because it established a

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129. *Id.* at 298 (classifying this latest policy as “the final policy”).

130. *Id.* The final policy, in its entirety, provides:

STUDENT ACTIVITIES:

PRE-GAME CEREMONIES AT FOOTBALL GAMES

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.

*Id.* at 298-99.

131. *Id.* at 298.

132. *Id.* at 317 (concluding that the District’s prayer policy did not create a constitutional safe harbor).

majoritarian election on religion and created the perception of encouraging prayer at important school events.<sup>133</sup>

The majority opinion, which Justice Stevens wrote, rejected the argument that the policy should survive constitutional scrutiny because the prayer messages constituted private student speech, not public speech.<sup>134</sup> The Court further found that the prayer messages amounted to public speech because the invocations took place on government property during government-sponsored events, and were authorized specifically by a government policy.<sup>135</sup> The Court specifically noted that the policy constituted public speech because it prevented arbitrary use by the student body and its regulations limited the topic and content of the message.<sup>136</sup> The Court specifically criticized the District's policy because it ensured that only those messages that the District found "appropriate" could be delivered.<sup>137</sup>

The Court next discussed the effects of the District's prayer policy upon the minority student population.<sup>138</sup> The Court found that while the election process might guarantee that a majority of students receive representation, the policy did nothing to protect the minority,

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133. *Id.* (affirming the decision of the Fifth Circuit Court of Appeals).

134. *Id.* at 302. Justice Stevens did acknowledge the distinction between government speech that endorses religion, which is not allowed by the Establishment Clause, and private speech that endorses religion, which the Establishment Clause authorizes. *Id.* (citing *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., plurality)).

135. *Id.* The Supreme Court noted that an individual's contribution to a government-created forum does not constitute government speech. *Id.* (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)). For more information on the significance of the fact that activity took place on government property see *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (discussing the "traditional public forum" doctrine); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (discussing the "limited public forum" doctrine); *Widmar v. Vincent*, 454 U.S. 263 (1981) (discussing the "limited public forum" doctrine). The Court found, however, that the District failed to actually argue that the pregame ceremony constituted a forum that would allow religious speech. *Santa Fe*, 530 U.S. at 303 n.12. Even if it were found that the District created a public forum, the Court noted that the Supreme Court has never held that the simple creation of a public forum protects the government from Establishment Clause scrutiny. *Id.* at 303 n.13 (citing *Pinette*, 515 U.S. at 772 (O'Connor, J., concurring in part and concurring in judgment)).

136. *Santa Fe*, 530 U.S. at 302-03 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988)). The Court compared this case to its decision in *Perry Educational Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983), where the Court rejected a claim that a school created a limited public forum in its mail system, although the system allowed for more speakers and a broader range of topics than the policy adopted by the Santa Fe School District. *Id.* "[S]elective access does not transform government property into a public forum." *Id.* (quoting *Perry*, 460 U.S. at 47).

137. *Id.* at 304.

138. *Id.* at 304-06 (referring to students whose viewpoints are among the minority, not necessarily racial or ethnic minorities).

and therefore, placed them at the mercy of the majority's decisions.<sup>139</sup> The Court determined that the District's policy regarding student elections inadequately safeguarded diverse student speech "[b]ecause 'fundamental rights may not be submitted to vote; they depend on the outcome of no elections[.]'"<sup>140</sup>

The Court remarked that, in cases involving state participation in religious activity, it was relevant to ask whether an objective individual, familiar with a statute's text, legislative history, and implementation, would perceive the state policy as an endorsement of prayer in public schools.<sup>141</sup> Although the District claimed no part in promoting student-initiated pre-football game prayers, the *Santa Fe* Court found that in reality, the District's policy involved both a perceived an actual endorsement of religion.<sup>142</sup> The Court reached this conclusion by examining the text and history of the policy, which indicated that the policy's purpose included allowing prayer as a part of the pregame football ceremony.<sup>143</sup>

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139. *Id.* at 304.

140. *Id.* at 304-05 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

141. *Id.* at 308 ("Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.").

142. *See id.* at 305-07. The Court specifically noted:

The District has attempted to disentangle itself from the religious messages by developing the two-step student election process . . . . [However, the results of the elections . . . make it clear that the students understood the central question before them was whether prayer should be a part of the pregame ceremony. We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment.

*Id.* (footnotes omitted).

143. *See id.* at 307-08. The District argued that the secular purposes for the policy included fostering free expression of private persons, solemnizing sporting events, promoting good sportsmanship and safety, and establishing an appropriate environment for competition. *Id.* at 309. The Court rejected these purposes and stated that the District's approval of an "invocation" was not necessary to further any of the proposed purposes. *Id.* The Court also commented that the delivery of a content-limited message did little to advance free expression. *Id.* Given the history of "regular delivery of a student-led prayer at athletic events," it is reasonable to infer that the purpose of the prayer policy "preserve[d] a popular 'state-sponsored religious practice.'" *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)).

Moreover, the Court pointed to factors beyond the text of the policy to establish the actual or perceived endorsement of the message by the District. *Id.* at 307. These factors included: the invocation was delivered to an audience gathered as part of a regularly scheduled, school-sponsored event conducted on school property; the prayer was delivered over the school's public address system; the football team, cheerleaders, and band members were dressed in uniforms adorning the school name and mascot; the school's name was printed across the field, banners, and flags; and the crowd was also dressed in attire supporting the school. *Id.* at 307-08.

The *Santa Fe* Court then confronted the argument that no impermissible government coercion took place because the students delivered the pregame messages and they voluntarily attended the football games.<sup>144</sup> Although the students ultimately chose the student speaker under the policy, the Court attributed the District's decision to hold the election to the State.<sup>145</sup> The Court determined that this decision encouraged religious divisions in a public school setting, and that this result contravened the Establishment Clause.<sup>146</sup>

Regarding voluntary attendance at football games, the Court simply stated that the Constitution forbids the District from exacting religious conformity from a student as a condition of attending a varsity football game.<sup>147</sup> In addition, although the Establishment and Free Exercise Clauses of the First Amendment prevent the government from passing laws that establish a religion or prohibit the free exercise of religion, the Court pointed out that not all religious activity is prohibited in public schools.<sup>148</sup> Accordingly, "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday."<sup>149</sup> However, this prayer

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144. See *id.* at 310 (articulating the District's argument that attempted to distinguish this case from *Weisman*).

145. *Id.* at 311 (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

146. *Id.* at 311-12.

147. *Id.* at 312-13. The Court stated:

Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. For "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." As in *Lee [v. Weisman]*, "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ machinery of the State to enforce a religious orthodoxy."

*Id.* at 312 (internal citations omitted).

148. *Id.* at 313 (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (O'Connor, J., plurality); *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985)).

149. *Id.* This statement is in accord with the 1984 Equal Access to Facilities Act, 20 U.S.C. §§ 4071-74 (1994). This Act, in pertinent part, states:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a). Accordingly, the Act requires that public schools allow religious clubs and organizations the same access to their facilities as secular clubs and organizations. See *Silver*, *supra* note 89, at 221 (assessing the religious discord found in schools and communities). The Supreme Court sustained the

cannot be state-sponsored.<sup>150</sup>

Finally, the Court rejected the District's claim that the families prematurely challenged the facial validity of the prayer policy.<sup>151</sup> In rather shocking rhetoric, the Court described the case as "the latest step in developing litigation . . . to [challenge] institutional practices that unquestionably violated the Establishment Clause."<sup>152</sup> Further, the Court refused "to turn a blind eye" to the context in which the policy arose.<sup>153</sup>

The District argued that until a student actually delivers a prayer pursuant to the policy, there is no certainty that any of the statements or invocations will be religious.<sup>154</sup> Although the Court agreed with this argument, the Court disagreed with the argument that the policy necessarily survives a facial challenge on two grounds.<sup>155</sup> First, by simply enacting the policy, the District violated the Constitution because the policy endorsed student prayer.<sup>156</sup> Accordingly, a student does not need to actually recite a prayer for a constitutional violation to occur.<sup>157</sup> Second, the Court stated that the policy is facially invalid because it impermissibly imposed a majoritarian election on the issue of prayer upon the student body.<sup>158</sup>

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constitutionality of the Act in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 253 (1990) (O'Connor, J., plurality). In *Mergens*, a group of high school students sought the formation of a Christian club that would have met after school hours on school premises. *Mergens*, 496 U.S. at 231-32. The club's purpose was to permit students to read and discuss the Bible, to promote fellowship, and to pray together. *Id.* at 232. Membership in the club was to be voluntary and open to all students, regardless of religious affiliation. *Id.* School officials denied the requests because they thought a religious club at the school would violate the Establishment Clause. *Id.* at 232-33. The Supreme Court held that because the high school maintained a "limited open forum" under the Equal Access to Facilities Act, it could not discriminate against students who wished to hold a meeting after school based upon the content of their speech. *Id.* at 246-47. Accordingly, the Act did not, on its face, violate the Establishment Clause. *Id.* at 253.

150. See *Santa Fe*, 530 U.S. at 313 (stating specifically that religious liberty is abridged when the state affirmatively sponsors a particular practice of prayer); see also generally *Wallace*, 472 U.S. at 38; *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

151. *Santa Fe*, 530 U.S. at 313.

152. *Id.* at 315.

153. *Id.*

154. *Id.* at 313.

155. See *id.* at 313, 316-17.

156. *Id.* 316.

157. See *id.* (finding that the policy nevertheless fails a facial constitutional challenge because the District sought to endorse religion).

158. *Id.* The Court elaborated:

Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not



Consequently, the Court invalidated the policy on its face because it encouraged prayer at important high school events and established an improper majoritarian election on religion.<sup>159</sup>

### C. *The Santa Fe Dissenting Opinion*

Chief Justice Rehnquist, writing for the dissent, proclaimed that the majority "distort[ed] existing precedent to conclude that the school district's student-message program [was] invalid on its face under the Establishment Clause."<sup>160</sup> The Chief Justice found the tone of the majority's opinion even more disturbing because it bristled "with hostility to all things religious in public life."<sup>161</sup> The Chief Justice quoted George Washington and argued that neither the holding nor the tone of the majority opinion followed prior Establishment Clause jurisprudence.<sup>162</sup>

Chief Justice Rehnquist criticized the majority decision to strike down the policy even though the District had not implemented its policy.<sup>163</sup> He further explained that the question was not whether the policy could violate the Establishment Clause, but whether the policy inevitably violates the Establishment Clause.<sup>164</sup> Accordingly, he criticized harshly the Court's decision to enter "the realm of prophecy."<sup>165</sup>

acceptable.

*Id.* & n.23.

159. *See id.* at 317.

160. *Id.* at 318 (Rehnquist, C.J., dissenting).

161. *Id.* (Rehnquist, C.J., dissenting); *see also* Editorial, *Tolerance Is Essential Where State and Religious Interests Overlap*, TAMPA TRIB. TIMES, Oct. 31, 1999, at 2 (arguing that the government "has become less tolerant and . . . unconstitutionally hostile" toward the expression of higher loyalties at government-sponsored events). *Contra The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 249, 258-59 (2000) (asserting that the Court is attempting to foster religious plurality rather than favoring the secular over the religious) [hereinafter *Leading Cases*]; Steve Kloehn, *High Court Treads Ever So Lightly on Prayer . . . Again*, CHI. TRIB., June 23, 2000, at 2 (characterizing the majority decision bristles with "an acute state of nervous sensitivity" rather than hostility).

162. *Santa Fe*, 530 U.S. at 318 (Rehnquist, C.J., dissenting). At the request of the Congress that passed the Bill of Rights, George Washington proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God . . ." A NATIONAL THANKSGIVING, 1 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, at 64 (James D. Richardson ed. 1903). Moreover, one of the first acts of the First Congress was the hiring of a chaplain. *See* George F. Will, Editorial, *Fumble on Prayer*, WASH. POST, June 21, 2000, at A23 (strongly criticizing the *Santa Fe* opinion).

163. *Santa Fe*, 530 at 318 (Rehnquist, C.J., dissenting). (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987), to say that just because a policy "might 'operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid'").

164. *Id.* (Rehnquist, C.J., dissenting).

165. *Id.* at 319 (Rehnquist, C.J., dissenting).

The Chief Justice also criticized the majority's application of "the most rigid version of the oft-criticized" *Lemon* Test.<sup>166</sup> Moreover, the dissent asserted that even if it were appropriate to apply the *Lemon* Test, the majority incorrectly found the policy invalid on its face.<sup>167</sup> First, the dissent posited that the majority "misconstrue[d] the nature of the 'majoritarian election' permitted by the policy as . . . an election on 'prayer' and 'religion.'"<sup>168</sup> Several possibilities existed, which led the dissent to believe that the two-fold student election would not produce an "invocation" before football games.<sup>169</sup> Nevertheless, the majority ignored these alternatives and found that the District improperly granted the student body the ability to elect a speaker, who may choose to pray.<sup>170</sup>

Second, the Dissent contended that the District's policy had plausible secular purposes of solemnizing the events, promoting good sportsmanship and student safety, and establishing the appropriate environment for the competition.<sup>171</sup> The dissent also noted that when "a government body 'expresses a plausible secular purpose' for an enactment [of a policy], 'courts should generally defer to that statement of intent.'"<sup>172</sup> The dissent proclaimed that the majority opinion "grant[ed] no deference to—and appear[ed] openly hostile toward—the policy's stated purposes, and wastes no time in concluding that they are a sham."<sup>173</sup>

Finally, the dissent criticized the Court's "new requirement" that demanded a government policy be completely content neutral to pass constitutional scrutiny.<sup>174</sup> Arguing that Establishment Clause jurisprudence does not require complete "content neutrality" as the

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166. *Id.* (Rehnquist, C.J., dissenting) (citing the checkered history of the *Lemon* decision and noting the Court's willingness to find the *Lemon* decision nonbinding).

167. *Id.* at 320 (Rehnquist, C.J., dissenting) (saying that the majority "misse[d] the mark").

168. *Id.* (Rehnquist, C.J., dissenting).

169. *Id.* at 320-21 (Rehnquist, C.J., dissenting). Such possibilities included the possibility that the students might vote not to have a pregame speaker, which would provide no threat of a constitutional violation. *Id.* at 321 (Rehnquist, C.J., dissenting).

170. *Id.* (Rehnquist, C.J., dissenting) (criticizing the majority for failing to consider that a speech may constitute private, not public speech).

171. *Id.* at 322 (Rehnquist, C.J., dissenting) (arguing that the Establishment Clause does not prohibit students from solemnizing events).

172. *Id.* (Rehnquist, C.J., dissenting) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring)); see also *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (noting the Court's normal deferential posture regarding a state's articulation of a secular purpose); Gordus, *supra* note 106, at 666 (commenting that the Supreme Court has directed courts to defer substantially to the government's stated purpose).

173. *Santa Fe*, 530 U.S. at 322 (Rehnquist, C.J., dissenting).

174. *Id.* at 325 (Rehnquist, C.J., dissenting) (observing that "content neutrality" is found in First Amendment speech cases and is used to determine the application of strict scrutiny).

majority demanded, the dissent asserted that school's do not violate the First Amendment every time they restrict student speech to certain categories.<sup>175</sup> The dissent lamented that a school policy, which allows the student body president to solemnize a graduation ceremony by giving a favorable introduction to a guest speaker, would be facially unconstitutional because the majority believes that all solemnization promotes prayer.<sup>176</sup>

### III. *SANTA FE V. DOE*: INCORRECTLY APPLYING CONSTITUTIONAL JURISPRUDENCE AND OPENING THE DOOR TO NEW CONSTITUTIONAL CHALLENGES

#### A. *The Incorrect Use of Prior Establishment Clause Jurisprudence To Strike Down Student-Initiated, Student-Led Prayer*

##### 1. *Incorrectly Characterizing the District Policy as a Violation of the Endorsement Test*

The Endorsement Test prohibits the government from "endorsing," "favoring," "preferring," or "promoting" one religious belief over another.<sup>177</sup> In striking down the District's prayer policy as a violation of the Establishment Clause, the Court proclaimed boldly that "[c]ontrary to the District's repeated assertions that it has adopted a 'hands-off' approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both a perceived and an actual endorsement of religion."<sup>178</sup> The Court based this statement on a finding that the school involved itself in the selection of the student speaker, who the school invites and encourages to give a religious message.<sup>179</sup> Although the students were asked simply to vote on whether to have a student speaker before football games and who that speaker would be, the Court found that "the students understood that the central question before them was whether prayer should be a part of the pregame ceremony."<sup>180</sup> The Court placed particular importance on the fact that students delivered the invocation over the school's public address system, during a school function, and on school property.<sup>181</sup> Consequently, the majority determined that an objective high school student would perceive the

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175. *Id.* (Rehnquist, C.J., dissenting).

176. *Id.* at 325-26 (Rehnquist, C.J., dissenting). The majority states that solemnization "invites and encourages religious messages." *Id.* at 306.

177. *Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989).

178. *Santa Fe*, 530 U.S. at 305.

179. *Id.* at 305-06 (recognizing that the policy intended to solemnize the event and arguing that solemnization is most obviously accomplished through the recitation of a religious message).

180. *Id.* at 306-07.

181. *Id.*

pregame invocation as “stamped” with the school’s approval.<sup>182</sup>

However, the majority determined incorrectly that the District’s prayer policy endorses religion.<sup>183</sup> As the dissent correctly stated, the majority misconstrued the nature of the District’s prayer policy as an election on “prayer” and “religion.”<sup>184</sup> The District created a two-fold process that allowed students to choose whether there would be a speaker before football games.<sup>185</sup> If the students chose to have a speaker, then they would vote on who that speaker would be; as such, it was conceivable that the students could have chosen not to have a speaker at all.<sup>186</sup> The majority viewed this two-step process as an attempt by the District to distance itself from a decision to support school prayer.<sup>187</sup> The policy, however, provided no guidance on the content of a student speaker’s speech beyond allowing the student to briefly solemnize the event.<sup>188</sup>

Although the majority claimed that a “religious message is the most obvious method of solemnizing the event,”<sup>189</sup> the dissent correctly observed that many solemn messages are not religious in nature.<sup>190</sup> In these situations, no threat of a constitutional violation exists because the speech would not mention religion.<sup>191</sup> The mere possibility of including a religious message amidst several other choices does not constitute state endorsement of religion.<sup>192</sup> Rather, the state endorses religion as one possibility among several possible forms of student speech.<sup>193</sup>

Had the Court upheld the policy, a student, not the school, would

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182. *Id.* at 308; see also Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 56 (2000) (hypothesizing that the majority found that the District’s policy “obviously” sponsored prayer).

183. *Santa Fe*, 530 U.S. at 320 (Rehnquist, C.J., dissenting).

184. *Id.* (Rehnquist, C.J., dissenting).

185. *Id.* (Rehnquist, C.J., dissenting).

186. *Id.* at 321 (Rehnquist, C.J., dissenting); see also Laycock, *supra* note 182, at 56. (observing the dissent’s disagreement with the majority’s premature assumption that the policy would consistently lead to prayer).

187. See *Santa Fe*, 530 U.S. at 305-06.

188. See *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 812 (5th Cir. 1999), *reh’g en banc denied*, 171 F.3d 1013, 1014 (5th Cir. 1999) (per curiam), *aff’d*, 530 U.S. 290, 317 (2000) (discussing the October 1995 policy).

189. *Santa Fe*, 530 U.S. at 306.

190. *Id.* at 322 (Rehnquist, C.J., dissenting) (saying that a message that urges that a game be fairly fought is solemn, but not religious).

191. See *id.* at 321 (Rehnquist, C.J., dissenting).

192. See *id.* (Rehnquist, C.J., dissenting) (noting that the majority disregards the possibility that the student election may not focus on prayer); see also *Lee v. Weisman*, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) (proclaiming that “[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State”).

193. See *Santa Fe*, 530 U.S. at 320-22 (Rehnquist, C.J., dissenting).

have selected and created the speech.<sup>194</sup> For example, the students may have elected a speaker according to secular criteria,<sup>195</sup> but the speaker, by his own accord, may have chosen to deliver a religious message.<sup>196</sup> Most likely, this situation would have passed constitutional scrutiny because the speech would have been private speech initiated solely by the student, and not public speech that the government initiated.<sup>197</sup> Accordingly, the District's policy would not "endorse," "favor," "prefer," or "promote" a certain religious belief over the belief of others.<sup>198</sup>

## 2. *Erroneously Concluding That the District's Policy Violated the Coercion Test*

Pursuant to *Lee v. Weisman*, the Court analyzed school-sponsored religious activity by determining a policy's coercive effect on students.<sup>199</sup> The *Santa Fe* Court found that the District's policy failed

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194. *Id.* at 324 (Rehnquist, C.J., dissenting) (suggesting that the student speech may have constituted private, not public speech).

195. *Id.* (Rehnquist, C.J., dissenting). Examples of secular criteria include good public speaking skills or social popularity. *Id.* (Rehnquist, C.J., dissenting).

196. *Id.* (Rehnquist, C.J., dissenting).

197. *Id.* (Rehnquist, C.J., dissenting). *But cf.* *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (holding that the First Amendment does not protect offensive and lewd speech given by a student at a school assembly). There is a "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990). In *Mergens*, the Court noted that a school neither endorses nor supports student speech that is permitted on a nondiscriminatory basis. *See id.* (citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which found no danger that high school students' symbolic speech implied school endorsement, and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which held the same). When no formal classroom activities are involved, and state officials fail to participate actively in the activities, there exists little risk of coercion or official state endorsement of religion. *Mergens*, 496 U.S. at 251. Further, from the 1960s until the 1980s, student-initiated prayers during school events were usually found in violation of the Establishment Clause. *McCarthy*, *supra* note 42, at 139. In the 1990s, federal courts began to interpret private speech more broadly and expanded the circumstances under which student-initiated prayers were allowed in public education. *Id.* *But see supra* note 135, and accompanying text.

198. *See Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989). The Endorsement Test fails to distinguish among those students alienated by the religious exercise and those students excluded because of their religious practices. *Leading Cases, supra* note 161, at 253-54. The Establishment Clause requires this result. *Id.* at 254. By focusing solely on students who the religious exercise alienates, the Court disregards the alienation felt by those students who regard the prayer exercise as an important part of their public life. *Id.* Thus, the Court endorses secularism over religion. *Id.* "[T]he fact that students may sometimes feel like outsiders does not provide a secure doctrinal foundation for the protection of the liberty and beliefs of students in the religious minority." *Id.*

199. *See Santa Fe*, 530 U.S. at 317. "[U]nconstitutional coercion [occurs] when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige

the Coercion Test because it coerced students into participating in "an act of religious worship."<sup>200</sup> Although attendance at a football game is voluntary for most students, the games are "traditional gatherings" for the entire school community.<sup>201</sup> The First Amendment prohibits the school from making students choose between attending football games or facing a potentially offensive religious worship.<sup>202</sup> The Court compared this case with *Weisman* and asserted that "[w]hat to most believers may seem nothing more than a reasonable request that the non-believer respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."<sup>203</sup> The Court, therefore, concluded that the District could not require religious conformity from a student as the price for attending a varsity football game.<sup>204</sup>

The Court found the policy to be unconstitutionally coercive by focusing on issues that should have allowed the policy to pass the Coercion Test.<sup>205</sup> First, attendance at a high school football game, unlike class attendance, is not a graduation requirement.<sup>206</sup> Second, the Court conceded that the informal pressure on students to attend a high school football game is not as strong as the pressure on students to attend their school graduation ceremony, which was at the heart of *Lee v. Weisman*.<sup>207</sup> Unlike *Weisman*, the District's policy did not compel student attendance and participation in an overtly religious exercise at an event "of singular importance to every

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the participation of objectors." *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992), *reh'g denied*, 983 F.2d 234 (5th Cir. 1992) (*Clear Creek III*). *Contra Leading Cases*, *supra* note 161, at 255 (noting assertions that the Coercion Test is structurally deficient and its expansion into physiological principles casts doubt on its effectiveness).

200. *Santa Fe*, 530 U.S. at 312.

201. *Id.* at 311. Seasonal commitments mandate that football players, cheerleaders, and band members attend the football games. *Id.* Interestingly enough, the Court failed to recognize that the decision to be a cheerleader, band member, or football team member is voluntary and not required for graduation. *See id.*

202. *Id.* "It is a tenant of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)).

203. *Id.*

204. *Id.*

205. *See id.* at 311 (evaluating the District's argument that attendance at high school football games is a "passing interest" and "decidedly extracurricular," and thus dissipating coercion).

206. *Id.* (stating that attendance at varsity football games is "certainly not required in order to receive a diploma").

207. *Id.* (assuming that informal pressure on a student to attend a school athletic event is weaker than a student's desire to attend his or her graduation ceremony).

student," like that of a graduation ceremony.<sup>208</sup>

In addition, the Coercion Test contends that "unconstitutional government coercion occurs when the government directs the performance of a formal religious exercise and whenever those who object to the exercise are [obligated] to participate."<sup>209</sup> When a voluntary and neutral political process produces prayer, the norms of the community, not the norms of the government, are reflected.<sup>210</sup> The District's policy created a two-pronged process whereby the students, not the school, voted (1) on whether to have a speaker before football games; and (2) who that speaker should be.<sup>211</sup> When a community voluntarily engages in a vote or other political process that ultimately produces prayer, the prayers are the initiative of the community, and not the product of coercion by the government.<sup>212</sup> Accordingly, the District's policy did not constitute unconstitutional coercion by the government.<sup>213</sup>

208. *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

209. John P. Cronan, Note, *A Political Process Argument for the Constitutionality of Student-Led, Student-Initiated Prayer*, 18 YALE L. & POL'Y REV. 503, 510 (2000) (arguing that the Supreme Court should reverse the Fifth Circuit's *Santa Fe v. Doe* decision and affirm the constitutionality of student-initiated, student-led prayer by applying a political process analysis of community norms).

210. *Id.*

211. *Santa Fe*, 530 U.S. at 320 (Rehnquist, C.J., dissenting).

212. See Cronan, *supra* note 209 (arguing that prayer produced by a political process cannot violate the Coercion Test).

213. To strike down the District's policy as a violation of the Establishment Clause, the Court rebutted the District's argument that the plaintiffs made a premature challenge to the policy. See *Santa Fe*, 530 U.S. at 313. The Court admitted that unless a student delivered a message under the District's most recent policy, it remained uncertain as to whether any "invocation" would be religious in nature. *Id.* Although no "invocation" had actually been given pursuant to the policy, the Court declared the policy unconstitutional "on its face" because it had the unquestionable purpose and perception "of encouraging the delivery of prayer at a series of important school events." *Id.* at 317. As the dissent correctly noted, the Court incorrectly applied the *Lemon* Test to achieve the desired outcome. See *id.* at 319 (Rehnquist, C.J., dissenting) (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

The Dissent noted *Lemon's* "checkered career in the decisional law of [the] Court." *Id.*; Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (deriding the "Sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*"); see also Will, *supra* note 162, at A23 (arguing that the *Santa Fe* decision "lengthens the [C]ourt's meandering record of on-again, off-again, and occasionally partial, adherence to" the *Lemon* Test). Moreover, the dissent accurately recognized that the Court has gone even as far as to suggest that the *Lemon* Test is not binding. See *Santa Fe*, 530 U.S. at 319-20 (Rehnquist, C.J., dissenting) (citing *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)). "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area . . . . In two cases, the Court did not even apply the *Lemon* 'test.'" *Lynch*, 465 U.S. at 668.

In 1997, the Court exclusively referred to *Lemon* in *Agostini v. Felton*, 521 U.S. 203 (1997), primarily to highlight problems with the Court's application of the *Lemon* Test in two decisions rendered twelve years earlier. McCarthy, *supra* note 42, at 129

B. *Opening the Door to New Challenges Against State "Moment of Silence Laws"*

Although the Supreme Court struck down a "moment of silence" law in *Wallace v. Jaffree*, many states have instituted laws permitting or requiring students to spend time during the school day in silent meditation.<sup>214</sup> Although a few statutes explicitly require students to

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(citing *Agostini*, 521 U.S. at 218-20, but overturning *Aguilar v. Felton*, 473 U.S. 492 (1985) and *School District v. Ball*, 473 U.S. 373 (1985)). Instead of reaffirming the three-part *Lemon* Test, the Court appeared to use the "excessive entanglement" prong as a separate analytical tool. *Id.* (citing *Agostini*, 521 U.S. at 232-33). Moreover, several lower courts have chosen not to rely solely on *Lemon* and have reviewed government actions under a multitude of standards. *See id.* at 130. Some commentators even say that *Lemon* has been discredited. *Id.*; *see also* Loeb, *supra* note 30, at 1309 (noting that recent Supreme Court cases reveal that the Court has distanced itself from the *Lemon* Test). Yet it is with *Lemon* that the Court finds the District's policy facially unconstitutional. *See Santa Fe*, 530 U.S. at 314. This decision was misguided.

Even if it were appropriate to apply the *Lemon* Test to the District's policy, the dissent properly concluded that the policy is not invalid on its face. *See id.* at 320 (Rehnquist, C.J., dissenting). The Court held that the simple enactment of a policy "with the purpose and perception of school endorsement of student prayer" constituted a violation of the Establishment Clause. *Id.* at 316. The dissent, however, found plausible secular purposes. *Id.* at 322 (Rehnquist, C.J., dissenting). These purposes included solemnizing the event, promoting good sportsmanship and student safety, and establishing the appropriate environment for competition. *Id.*; *see also, e.g.*, *Chaudhuri v. Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997) (finding that nonsectarian prayers at school events had the secular purpose of dignifying and memorializing a public occasion). Given that courts generally defer to the expressed secular purpose of an enactment by a governmental body, the dissent properly found in error the Court's decision to grant no deference to the District and the Court's conclusion that the secular purposes were "a sham." *See Santa Fe*, 530 U.S. at 322 (Rehnquist, C.J., dissenting) (citing *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985)); *see also generally* note 175 and accompanying text.

214. *See* Johnson, *supra* note 55, at 1019-20 (concluding that the Supreme Court would uphold pure moment of silence statutes). A pure "moment of silence" statute establishes a moment of silence without specifying in anyway that the moment is for prayer. *Id.* at 1020 n.11.

Distinctions exist between organized prayer in schools and organized "moments of silence." Silver, *supra* note 89, at 223. While officially mandated prayers are unconstitutional, it is argued that officially mandated "moments of silence" that create personal opportunities for prayer are allowable if religious neutrality is maintained. *Id.* at 224. Dicta in the Court's opinion in *Wallace v. Jaffree* suggests that moment of silence laws are constitutional. *Id.* at 224-25 & n.77 (citing *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) and stating that "[t]he legislative intent to return prayer to public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday"). Commentators claimed that so long as the "moments of silence" are neutral towards prayer, the observation of the moment of silence is constitutionally unobjectionable. *Id.* at 225. *Contra* 68 AM. JUR. 2D *Schools* § 358 (2000) (remarking that a state statute authorizing a one-minute "moment of silence," whose sole purpose is to return voluntary prayer to public schools, violates the Establishment Clause even if the statute does not preference prayer over other forms of silent activity).

Congress has attempted to pass a constitutional amendment allowing for school



spend time in meditation, the majority of these statutes mandate a moment of silence at the beginning of each school day for meditation, reflection, or prayer.<sup>215</sup>

Many of the lower courts that have dealt with the constitutionality of "moment of silence" statutes have upheld their constitutionality.<sup>216</sup> Some courts have even found that a "moment of silence" statute can have a secular purpose.<sup>217</sup>

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prayer numerous times. See Silver, *supra* note 89, at 216-17. In 1962, shortly after the Supreme Court decision of *Engel v. Vitale*, twenty-two senators and fifty-three representatives introduced constitutional amendments allowing for school prayer. *Id.* at 216. In 1982, majorities in both the House of Representatives and the Senate voted for a voluntary prayer amendment, but both Houses fell short of the two-thirds majority required to pass a constitutional amendment. *Id.* Later in 1992, the Senate defeated a proposed school prayer amendment by a vote of thirty-eight to fifty-five. *Id.* More recently, in 1998, a majority of the United States Congress voted to support the Religious Freedom Amendment, which provided for school prayer. Loeb, *supra* note 30, at 1306 (noting that a number of elected officials embrace the view that there should be a relationship between religious and public life).

215. Johnson, *supra* note 55, at 1019. These statutes can be differentiated from the statute in *Wallace v. Jaffree*. See *id.* The Court, in *Wallace v. Jaffree*, found that the legislative history of the statute demonstrated a blatant attempt to return prayer into the classrooms. See *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985). Many state statutes are, however, not rich in legislative history and some states have even chosen not to record it. See Johnson, *supra* note 55, at 1019 n.10. But see Morris, *supra* note 63, at 27-28 (noting that many "moment of silence" statutes have code numbers similar or identical to previous unconstitutional prayer or Bible-reading statutes and that most statutes allow for a "moment of silence" at the start of the school day—the time previously set aside for reciting prayers or Bible readings in public schools).

216. See Richardson, *supra* note 50, at 212 (analyzing the constitutionality of North Carolina's Moment of Silence Law and concluding that it would be declared unconstitutional). The North Carolina statute currently provides for a one-minute period of silence in an effort "[t]o afford students and teachers a moment of quiet reflection at the beginning of each . . . public school [day]." N.C. GEN. STAT. § 115C-47(29) (1999). *Contra* Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874, 1893 (1983) (concluding that "moments of silence" create coercive classroom settings allow the state to advance and entanglement with religion).

217. See, e.g., *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997); *Gaines v. Anderson*, 421 F. Supp. 337, 342 (D. Mass. 1976) (finding that a Massachusetts statute that allowed a one-minute period of silence at the beginning of the school day did not violate the Establishment Clause because the statute had the secular purposes of aiding the educative function and inducing the respect for the teacher's authority). In *Gwinnett*, Mr. Bown alleged that Georgia's Moment of Quiet Reflection in Schools Act violated the Establishment Clause. *Gwinnett*, 112 F.3d at 1466. This Act allowed teachers to "conduct a brief period of 'silent prayer or meditation' at the beginning of each school day." *Id.* (quoting GA. CODE ANN. § 20-2-1050 (1996)). The Act's uncoded preamble provided that "society as a whole" would be better served if schools provided students with a moment of silence at the beginning of each school day. *Id.* The Eleventh Circuit analyzed the statute under the *Lemon* Test and found that the Act had the clear secular purpose of providing "a moment of quiet reflection to think about the upcoming day." *Id.* at 1472. Further, the Eleventh Circuit found that the Act neither had the primary purpose of advancing religion nor did it foster excessive entanglement with religion. *Id.* at 1473-74.

The Court's holding in *Santa Fe v. Doe* is likely to fuel new challenges to laws that provide for "moments of silence" in public schools.<sup>218</sup> Although the Court intended to limit its holding to the unconstitutionality of policies permitting student-led, student-initiated prayer at high school football games, the Court's reasoning will likely result in successful constitutional challenges to many "moment of silence" laws.<sup>219</sup>

For example, Virginia Code § 22.1-203,<sup>220</sup> which is similar to other

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Accordingly, the Eleventh Circuit held that the Act did not violate the Establishment Clause. *Id.* But see *May v. Cooperman*, 780 F.2d 240, 241 (3d Cir. 1985) (affirming a judgment that a New Jersey statute, which allowed a one-minute period of silence for quiet and private contemplation and introspection, violated the Establishment Clause because the legislators' entertained a religious purpose when they enacted the statute); *Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169, 1170 (S.D. W. Va. 1985) (holding that a state constitutional amendment designating a brief time for personal and private contemplation, meditation, or prayer violated the First and Fourteenth Amendments because the legislative history revealed a purpose of returning prayer to public schools).

218. Linda P. Campbell, *School Prayer Limited, Decision: Ruling Is the Broadest on Religion Issue Since 1992*, FORT WORTH STAR-TELEGRAM, June 20, 2000, at 1A (asserting that *Santa Fe* could be used to challenge other public school practices such as "moments of silence"); Richard Carelli, *Court Rules Against Stadium Prayer*, ASSOCIATED PRESS, June 19, 2000, available at 2000 WL 22888189 (stating that the *Santa Fe* decision will be likely cited in challenges to school policies allowing for "moments of silence"); Editorial, *Let Us Pray*, WALL ST. J., June 21, 2000, at A26 (quoting an ACLU spokesperson to say that laws allowing for "moments of silence [are] more vulnerable" due to the Court's ruling if the laws can be found to encourage prayer); Miller, *supra* note 10, at A10 (reporting that *Santa Fe* will create new challenges to "moment of silence" laws). But see Kloehn, *supra* note 161, at 2 (arguing that the direct effect of the *Santa Fe* decision will not be that great because it is unlikely to change spiritual foundations); Jeffrey Weiss, *Ruling Hardly Ends Debate on School Prayer: Decision Focused on Football Games, Not Other Student Efforts, Many Say*, DALLAS MORNING NEWS, June 20, 2000, at 1A (reporting that the rulings "relative narrowness" may still allow other types of student-initiated, student-led religious expression in public schools).

219. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000).

220. Virginia Code § 22.1-203 provides:

DAILY OBSERVANCE OF ONE MINUTE OF SILENCE. —In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division shall establish the daily observance of one minute of silence in each classroom of the division.

During such one-minute period of silence, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

The Office of the Attorney General shall intervene and shall provide legal defense of this law.

VA. CODE ANN. § 22.1-203 (Michie 2000 & Supp. I 2000).

state laws,<sup>221</sup> allows a moment of silence for meditation, reflection, or prayer.<sup>222</sup> On its face, Virginia Code § 22.1-203 states that its main purposes guarantee the students' right to free exercise of religion and provide the least possible pressure on students to engage in or refrain from religious observation on school grounds.<sup>223</sup> According to the principles enunciated in *Santa Fe*, courts are likely to regard these purposes as religious and to render them unconstitutional.

The *Santa Fe* Court found the District's policy facially invalid because the policy unquestionably had the "purpose and . . . perception of encouraging the delivery of prayer[.]"<sup>224</sup> The Virginia statute indicates that one of its purposes guarantees the students' right to free exercise of religion.<sup>225</sup> This provision creates the perception that the schools encourage prayer, and because of that, is likely found to be facially invalid under *Santa Fe*.

The statute's other stated purpose, to provide the least possible pressure on the students to engage in or refrain from religious observation on school grounds, attempts to survive constitutional

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The Virginia Code further provides:

GUIDELINES FOR CONSTITUTIONAL COMPLIANCE FOR STUDENT PRAYER.—To promote compliance with constitutional restrictions as well as observance of constitutional rights, the Board of Education shall, in consultation with the Office of the Attorney General, develop guidelines on constitutional rights and restrictions relating to prayer and other religious expression in the public schools. The Board's guidelines shall include, but shall not be limited to, provisions which address the following: the initiative and involvement of local school boards, individual schools, administrators, teachers, and students; the use of school facilities and equipment, including audio systems, and class time for prayer or other religious expression; and relevant state and federal constitutional concerns, such as freedom of religion and speech and separation of church and state. These guidelines shall not be subject to the requirements of the Administrative Process Act (§ 9-6.14:1 et seq.). However, in order to provide appropriate opportunity for input from the general public, teachers, and local school boards, the Board of Education shall conduct public hearings prior to establishing such guidelines. Thirty days prior to conducting such hearings, the Board shall give written notice by mail of the date, time, and place of the hearings to all local school boards and any other persons requesting to be notified of the hearings and publish notice of its intention to hold such hearings in the Virginia Register of Regulations. Interested parties shall be given reasonable opportunity to be heard and present information prior to the adoption of such guidelines.

VA. CODE ANN. § 22.1-280.3 (Michie 2000 & Supp. I 2000) (internal citations omitted).

221. See Johnson, *supra* note 55, at 1019 n.6 (citing *e.g.*, ARK. STAT. ANN. § 6-16-119 (Michie 1987); GA. CODE ANN. § 20-1-1050 (1987); ILL. ANN. STAT. ch. 122, para. 771 (Smith-Hurd 1961 & Supp. 1988); IND. CODE ANN. § 20-10.1-7-11 (Burns 1985); KAN. STAT. ANN. § 72-5308a (1985); PA. STAT. tit. 24, § 15-1516.1 (Purdon Supp. 1988)).

222. VA. CODE ANN. § 22.1-203, § 22.1-280.3.

223. VA. CODE ANN. § 22.1-203.

224. *Santa Fe*, 530 U.S. at 317.

225. VA. CODE ANN. § 22.1-203.

scrutiny by creating a pure "moment of silence" law.<sup>226</sup> However, the *Santa Fe* Court failed to defer to the policy's stated purpose and found it unconstitutional.<sup>227</sup> Similarly, if the Virginia statute's stated purpose is not given deference, the statute, and other similar state statutes would likely be found unconstitutional pursuant to the Establishment Clause and *Santa Fe*.

#### IV. CONCLUSION

The Supreme Court has shown little forbearance for the presence of prayer in public schools. The Court's decision in *Santa Fe* proved to be no different. In *Santa Fe Independent School District v. Doe*, the Supreme Court found a school district policy that permitted prayer before high school varsity football games to be facially invalid. The Supreme Court, for the first time, held that a policy allowing student-led, student-initiated prayer violated the Establishment Clause. Despite the Court's attempt to limit its holding to the facts of the case, *Santa Fe* will foreclose other government actions. "Moment of Silence" laws are among the government policies that are ready for new constitutional challenges. The Court's progression in limiting prayer in public schools indicates that it will be only a matter of time before these laws also become constitutional history.

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226. See *id.* At least some commentators believe that such laws would survive constitutional scrutiny. See, e.g., Johnson, *supra* note 55, at 1040-41, 1044; see also *supra* note 214 and accompanying text. Subsection (a) of Maryland's "moment of silence" law provides an example of a pure "moment of silence" statute. *Id.* at 1040. The statute provides that "[p]rincipals and teachers in each public elementary and secondary school in this State may require all students to be present and participate in opening exercises on each morning of a school day and to meditate silently for approximately 1 minute." MD. CODE ANN., Educ. § 7-104(a) (1999).

227. *Santa Fe*, 530 U.S. at 322 (Rehnquist, C.J., dissenting). Compare *id.* with *supra* note 172 and accompanying text.

